

This Opinion is Not a
Precedent of the TTAB

Mailed: January 22, 2024

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re MetaBev LLC

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Serial No. 90897101

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Hank Fasthoff, of Fasthoff Law Firm PLLC, for MetaBev LLC.

Kelley Wells, Trademark Examining Attorney, Law Office 118,
Michael Baird, Managing Attorney.

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Before Greenbaum, Coggins, and Johnson,
Administrative Trademark Judges.

Opinion by Johnson, Administrative Trademark Judge:

MetaBev LLC (“Applicant”) seeks registration on the Principal Register of the standard character mark CHILL (“Applicant’s Mark”), for goods ultimately identified as “hard seltzer” (“Applicant’s Goods”) in International Class (“Class”) 33.¹

¹ Application Serial No. 90897101 was filed on August 23, 2021, under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b), based on Applicant’s allegation of a bona fide intent to use the mark in commerce.

Citations to the appeal record are from the publicly available documents in TTABVUE, the Board’s electronic docketing system. *See, e.g., Turdin v. Trilobite, Ltd.*, 109 USPQ2d 1473, 1476 n.6 (TTAB 2014). The number preceding “TTABVUE” corresponds to the docket entry number; the number(s) following “TTABVUE” refer to the page number(s) of that particular docket entry, if applicable. All citations to prosecution history documents contained in the

The Examining Attorney refused registration of Applicant's Mark under Section 2(d) of the Trademark Act, 15 U.S.C. § 2(d), on the ground that Applicant's Mark is likely to be confused with the following registered marks:

CHILL (in standard characters), for "Beer" in Class 32;²

Chill, also for "Beer" in Class 32;³

CHILL FIZZ (in standard characters), for "Brewed sugar-based beer" in Class 32 and "hard seltzer" in Class 33;⁴ and

CHILL FIZZ ICONIC PHILLY HARD SELTZER (composite mark), for "Brewed sugar-based beer" in Class 32 and "hard seltzer" in Class 33, shown below:



When the refusal was made final, Applicant appealed. The appeal has been fully briefed.

Trademark Status and Document Retrieval (TSDR) database are to the downloadable .pdf versions of the documents.

² Registration No. 6092336 ("Registrant's Mark") issued on June 30, 2020, and is owned by Molson Coors Beverage Company USA LLC.

³ Registration No. 6063146 issued on May 26, 2020, and is owned by Molson Coors Beverage Company USA LLC. The mark is described as follows: The mark consists of the stylized word "CHILL" in red. The color white appears on the background but it is not claimed as a feature of the mark. The color red is claimed as a feature of the mark.

⁴ Registration No. 6043581 issued on April 28, 2020, and is owned by Chillfizz Beverage LLC.

⁵ Registration No. 6146108 issued on September 8, 2020, and is owned by Chillfizz Beverage LLC. The mark is described as follows: The mark consists of the word "CHILL" above the letters "FI," with the letter "I" on a 45 degree slant to the right, above the letters "ZZ," above a solid rectangle containing the words "ICONIC PHILLY HARD SELTZER." Color is not claimed as a feature of the mark.

I. Likelihood of Confusion

Section 2(d) of the Trademark Act provides that a mark must be refused registration if it “[c]onsists of or comprises a mark which so resembles a mark registered in the Patent and Trademark Office, or a mark or trade name previously used in the United States by another and not abandoned, as to be likely, when used on or in connection with the goods of the applicant, to cause confusion, or to cause mistake, or to deceive” 15 U.S.C. § 1052(d).

To determine whether there is a likelihood of confusion between the marks under Section 2(d), we analyze the evidence and arguments under the *DuPont* factors. *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973) (“*DuPont*”). We consider each *DuPont* factor for which there is evidence and argument, *In re Guild Mortg. Co.*, 912 F.3d 1376, 129 USPQ2d 1160, 1161-62 (Fed. Cir. 2019), but “[n]ot all *DuPont* factors are relevant in each case, and the weight afforded to each factor depends on the circumstances.” *Stratus Networks, Inc. v. UBTA-UBET Commc’ns Inc.*, 955 F.3d 994, 2020 USPQ2d 10341, at *3 (Fed. Cir. 2020). “Each case must be decided on its own facts and the differences are often subtle ones.” *Indus. Nucleonics Corp. v. Hinde*, 475 F.2d 1197, 177 USPQ 386, 387 (CCPA 1973).

In applying the *DuPont* factors, we bear in mind the fundamental purposes underlying Trademark Act Section 2(d), which are to prevent confusion as to source and to protect registrants from damage caused by registration of confusingly similar marks. *Park ‘N Fly, Inc. v. Dollar Park & Fly, Inc.*, 469 U.S. 189, 224 USPQ 327, 331

(1985); *Qualitex Co. v. Jacobson Prods. Co.*, 514 U.S. 159, 34 USPQ2d 1161, 1163 (1995); *DuPont*, 177 USPQ at 566. The proper focus is on the recollection of the average customer, who retains a general, rather than specific, impression of the marks. *Geigy Chem. Corp. v. Atlas Chem. Indus., Inc.*, 438 F.2d 1005, 169 USPQ 39, 40 (CCPA 1971); *L’Oreal S.A. v. Marcon*, 102 USPQ2d 1434, 1438 (TTAB 2012).

As previously mentioned, varying weights may be assigned to the various *DuPont* factors depending on the evidence presented. See *Citigroup Inc. v. Cap. City Bank Grp. Inc.*, 637 F.3d 1344, 98 USPQ2d 1253, 1260 (Fed. Cir. 2011); *In re Shell Oil Co.*, 992 F.2d 1204, 26 USPQ2d 1687, 1688 (Fed. Cir. 1993) (“[T]he various evidentiary factors may play more or less weighty roles in any particular determination.”). Two key considerations are the similarities between the marks and the relatedness of the goods. See *Herbko Int’l, Inc. v. Kappa Books, Inc.*, 308 F.3d 1156, 64 USPQ2d 1375, 1380 (Fed. Cir. 2002) (“The likelihood of confusion analysis considers all *DuPont* factors for which there is record evidence but ‘may focus ... on dispositive factors, such as similarity of the marks and relatedness of the goods.’”).

A. Focus on Registration Number 6,092,336

We focus our likelihood of confusion analysis on the cited standard character mark, CHILL, for “Beer” in Class 32 because it is identical to Applicant’s Mark. If we find a likelihood of confusion as to the standard character mark CHILL, we need not find it as to the stylized mark *Chill*, the standard character mark CHILL FIZZ, or the composite mark . Conversely, if we do not find a likelihood of confusion as to

the Registrant's Mark, we would not find it as to *Chill*, CHILL FIZZ, and . See, e.g., *In re Max Cap. Grp. Ltd.*, 93 USPQ2d 1243, 1245 (TTAB 2010) (likelihood of confusion analysis confined to most similar cited mark).

For the reasons discussed below, we affirm the refusal to register.

B. The Similarity or Dissimilarity of the Marks

Under the first *DuPont* factor, we determine the similarity or dissimilarity of Applicant's and Registrant's marks in their entireties, taking into account their appearance, sound, connotation, and commercial impression. *DuPont*, 177 USPQ at 567.

Applicant concedes that its standard character mark, CHILL, is identical to Registrant's standard character mark, CHILL. (Applicant's Appeal Brief, 4 TTABVUE 13). The first *DuPont* factor weighs heavily in favor of a finding of likelihood of confusion. See *In re Martin's Famous Pastry Shoppe, Inc.*, 748 F.2d 1565, 223 USPQ 1289, 1290 (Fed. Cir. 1984) ("This factor weighs heavily against applicant, as the two word marks are identical ...").

C. The Similarity or Dissimilarity and Nature of the Goods, and the Channels of Trade

Next, we turn to the second and third *DuPont* factors. The second *DuPont* factor concerns the "similarity or dissimilarity and nature of the goods or services as described in an application or registration or in connection with which a prior mark is in use." 177 USPQ at 567. The third *DuPont* factor concerns "the similarity or dissimilarity of established, likely-to-continue trade channels." *Id.*

When analyzing the second *DuPont* factor, we look to the identification of goods in the application and cited registration. *Stone Lion Cap. Partners v. Lion Cap. LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1162 (Fed. Cir. 2014); *Octocom Sys., Inc. v. Hous. Comput. Servs. Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787 (Fed. Cir. 1990) (“The authority is legion that the question of registrability of an applicant’s mark must be decided on the basis of the identification of goods set forth in the application regardless of what the record may reveal as to the particular nature of an applicant’s goods, the particular channels of trade or the class of purchasers to which sales of the goods are directed.”). The goods do not have to be identical or even competitive in order to find that there is a likelihood of confusion. *In re Iolo Techs., LLC*, 95 USPQ2d 1498, 1499 (TTAB 2010).

The issue is not whether the goods will be confused with each other, but rather whether the public will be confused as to their source. *See Recot, Inc. v. Becton*, 214 F.3d 1322, 54 USPQ2d 1894, 1898 (Fed. Cir. 2000) (“[E]ven if the goods in question are different from, and thus not related to, one another in kind, the same goods can be related in the mind of the consuming public as to the origin of the goods. It is this sense of relatedness that matters in the likelihood of confusion analysis.”). It is sufficient that the identified goods of the applicant and the registrant are related in some manner. *See, e.g., Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1722 (Fed. Cir. 2012) (citation omitted); *On-Line Careline Inc. v. Am. Online Inc.*, 229 F.3d 1080, 56 USPQ2d 1471, 1475 (Fed. Cir. 2000). Or, conditions surrounding the marketing of the goods could result

in the goods likely being encountered by the same consumers under circumstances that, because of the marks used in connection with the goods, would lead those consumers to mistakenly believe that the goods originate from the same source. *See, e.g., Coach Servs.*, 101 USPQ2d at 1722 (citation omitted); *On-Line Careline*, 56 USPQ2d at 1475.

Evidence of relatedness under the second factor may include pages from third-party websites showing that the relevant goods are used by purchasers for the same purpose; advertisements showing that the relevant goods are advertised together; or copies of use-based registrations of the same mark for both Applicant's identified goods and the goods listed in the cited registration. *See, e.g., In re Davia*, 110 USPQ2d 1810, 1817 (TTAB 2014) (pepper sauce and agave found related where evidence showed both were used for the same purpose in the same recipes; consumers were likely to purchase the products at the same time and in the same stores). Where, as here, an applicant's mark is identical to the registered mark, the degree of similarity or relatedness between the goods needed to support a finding of likelihood of confusion declines; "there need be only a viable relationship between the respective goods." *In re Davey Prods. Pty.*, 92 USPQ2d 1198, 1202 (TTAB 2009); *see also In re Country Oven, Inc.*, 2019 USPQ2d 443903, at *5 (TTAB 2019) (citing *In re i.am.symbolic, llc*, 116 USPQ2d 1406, 1411 (TTAB 2015), *aff'd*, 866 F.3d 1315, 123 USPQ2d 1744 (Fed. Cir. 2017)).

To demonstrate relatedness of the goods, the Examining Attorney submitted printed copies of pages from the websites for Bottle Republic, Whole Foods Market,

Walmart, Target, Drizly, Hazel’s Boulder, Bailey’s Boulder, Corona, Bud Light, Michelob Ultra, and CNBC showing that beer and hard seltzer often originate from the same source and are often advertised and sold under the same mark.⁶ The same evidence shows that hard seltzer is categorized as a subset of beer.⁷ The Examining Attorney also submitted printouts of articles from Bevindustry.com, and Jaihobeer.com that discuss hard seltzer as a subcategory of beer.⁸ We find the Examining Attorney’s evidence to be highly probative of relatedness, inasmuch as consumers are likely to be exposed to beer and hard seltzer offered for sale by the same source under the same house, word, or composite mark. *See, e.g., In re Detroit Athletic Co.*, 903 F.3d 1297, 128 USPQ2d 1047, 1051 (Fed. Cir. 2018) (relatedness supported by evidence that third parties sell both types of goods under same mark, showing that “consumers are accustomed to seeing a single mark associated with a source that sells both”); *In re Anderson*, 101 USPQ2d 1912, 1920 (TTAB 2012) (Internet excerpts from “several third-party car dealerships offering ‘tires’ for sale on their websites” was “evidence that consumers expect to find both ‘tires,’ . . . “and ‘automobiles’ . . . emanating from a common source.”).

Applicant counters that “something more” — often considered in cases involving food and restaurant services — is necessary in this case, and that there is no per se rule that all alcoholic beverages are related. (4 TTABVUE 16-17). Applicant is correct

⁶ Final Office Action dated Jan. 9, 2023 at 9-78.

⁷ *Id.*

⁸ Final Office Action dated Jan. 9, 2023 at 79-80 (Jaihobeer.com), 81-90 (Bevindustry.com).

in its assertion that there is no general rule that all alcoholic beverages are related. *See Indus. Nucleonics*, 177 USPQ at 387 (“Each case must be decided on its own facts and the differences are often subtle ones.”). We decline, however, to conduct a “something more” analysis here, inasmuch as no services are identified in the Application or the cited registration and relatedness of the identified goods is evident. *Cf. In re St. Helena Hosp.*, 774 F.3d 747, 113 USPQ2d 1082, 1087 (Fed. Cir. 2014) (applicant’s mark TAKETEN for, inter alia, health care services, and registrant’s TAKE10! mark for “printed manuals, posters, stickers, activity cards and educational worksheets dealing with physical activity and physical fitness” found not related; where the relatedness of the goods and services “is obscure or less evident, the PTO will need to show ‘something more’ than the mere fact that the goods and services are ‘used together.’”) (citation omitted); *In re Coors Brewing Co.*, 343 F.3d 1340, 68 USPQ2d 1059, 1063 (Fed. Cir. 2003) (“*Jacobs [v. Int’l Multifoods Corp.]*, 668 F.2d 1234, 212 USPQ 641, 642 (CCPA 1982)] provides that ‘to establish likelihood of confusion a party must show *something more* than that similar or even identical marks are used for food products and for restaurant services. *Id.* (emphasis added).”).

When analyzing the third *DuPont* factor, we consider whether the identifications of goods contain any restrictions as to channels of trade or classes of purchasers, and if there are none, we must presume that the identified goods travel in the ordinary channels of trade for such goods, and are offered or sold to all potential purchasers of such goods. *Cunningham v. Laser Golf Corp.*, 222 F.3d 943, 55 USPQ2d 1842, 1846 (Fed. Cir. 2000); *see also In re Elbaum*, 211 USPQ 639, 640 (TTAB 1981) (“[W]here

the goods in a cited registration are broadly described and there are no limitations in the identification of goods as to their nature, type, channels of trade or classes of purchasers, it is presumed that the scope of the registration encompasses all goods of the nature and type described, that the identified goods move in all channels of trade that would be normal for such goods, and that the goods would be purchased by all potential customers.”).

Applicant contends that its hard seltzer and Registrant’s beer are marketed to different consumers, and that the goods are found in different areas of the stores in which they are sold. (4 TTABVUE 14, 17-18). Applicant’s arguments are unavailing, however. The respective identifications for both Applicant and Registrant are broadly described and without limitation, so we must assume that the goods move through all normal and usual channels of trade for such goods, and that they are available to all normal potential purchasers of the goods. Here, the trade channels for Applicant’s hard seltzer and Registrant’s beer would include breweries, liquor stores, grocery markets, and other retail establishments which sell both beer and hard seltzer online and in brick-and-mortar stores. The relevant class of consumers for the identified goods also would be the same, i.e., adult members of the general public who consume alcohol.

The same third-party webpages referenced above demonstrate that beer and hard seltzer may be encountered by the same classes of consumers under the same marks in at least three common trade channels – the websites and physical locations of grocery stores, general consumer product stores, and liquor stores. This evidence

supports a finding, in line with the Examining Attorney's argument, that these goods are offered in at least three common channels of trade. *See In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201, 1204 (Fed. Cir. 2003) (malt liquor and tequila “similar by virtue of the fact that both are alcoholic beverages that are marketed in many of the same channels of trade to many of the same consumers”); *Anheuser-Busch, LLC v. Innvopak Sys. Pty Ltd.*, 115 USPQ2d 1816, 1827-28 (TTAB 2015) (“[I]t is clear that beer and other alcoholic beverages . . . are sold to consumers in many of the same channels of trade, including retail outlets such as liquor stores, supermarkets, convenience stores, restaurants, and bars . . .”). Applicant offers no evidence to the contrary.

Moreover, we find that consumers who are familiar with Registrant's Mark for beer, and who then encounter Applicant's Mark (i.e., the identical mark) for hard seltzer, may think Applicant's hard seltzer is a product line extension of Registrant's beer. *Cf., e.g., Double Coin Holdings Ltd. v. Tru Dev.*, 2019 USPQ2d 377409, at *7 (TTAB 2019) (“ROAD WARRIOR looks, sounds, and conveys the impression of being a line extension of WARRIOR”); *Joel Gott Wines LLC v. Rehoboth Von Gott, Inc.*, 107 USPQ2d 1424, 1433 (TTAB 2013) (“Purchasers of opposer's GOTT and JOEL GOTT wines are likely to assume that applicant's goods, sold under the mark GOTT LIGHT and design, are merely a line extension of goods emanating from opposer”); *Schieffelin & Co. v. Molson Cos.*, 9 USPQ2d 2069, 2073 (TTAB 1989) (“Those consumers who do recognize the differences in the [BRADOR and BRAS D'OR] marks

may believe that applicant's mark is a variation of opposer's mark that opposer has adopted for use on a different product.”).

Overall, we find all of the aforementioned third-party Internet evidence to be highly probative of relatedness. That same evidence supports our finding that beer and hard seltzer are offered to the same consumers in the same channels of trade. Therefore, the second and third *DuPont* factors also weigh heavily in favor of a finding of likelihood of confusion.

D. Alleged Numerosity of Marks Using CHILL for Alcoholic Beverages

Finally, we address Applicant's argument that the courts, USPTO, and the Board have allowed different categories of alcoholic beverages to coexist, and for that reason, Applicant's Mark and the Registered Mark should be allowed to coexist too. (4 TTABVUE 14-16). Applicant does not argue, explicitly, that the Registered Mark is weak, but Applicant does discuss third-party registrations of similar marks for goods which Applicant alleges are similar. Again, we consider each *DuPont* factor for which there is evidence and argument. *In re Guild Mortg.*, 129 USPQ2d at 1161-62. Evidence of third-party use and registration typically falls under the sixth *DuPont* factor, “the number and nature of similar marks in use on similar goods.” 177 USPQ 567.

Under the sixth *DuPont* factor, “[t]he purpose of introducing evidence of third-party use is ‘to show that customers have become so conditioned by a plethora of such similar marks that customers ‘have been educated to distinguish between different [such] marks on the bases of minute distinctions.’” *Omaha Steaks Int’l, Inc. v. Greater*

Omaha Packing Co., 908 F.3d 1315, 128 USPQ2d 1686, 1693 (Fed. Cir. 2018) (quoting *Palm Bay Imps. Inc. v. Veuve Clicquot Ponsardin Maison Fondee En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1694 (Fed. Cir. 2005) (internal citation omitted)). This type of evidence pertains to the commercial strength of the mark. “Evidence of third-party use of similar marks on similar goods is relevant to show that a mark is relatively weak and entitled to only a narrow scope of protection.” *Id.* (quoting *Palm Bay Imps.*, 73 USPQ2d at 1693). Evidence of actual third-party use of similar marks can be “powerful on its face” and can “show that customers ... have been educated to distinguish between different ... marks on the basis of minute distinctions,” *Juice Generation, Inc. v. GS Enters., LLC*, 794 F.3d 1334, 115 USPQ2d 1671, 1674 (Fed. Cir. 2015) (citation omitted), particularly if such evidence is “extensive.” *Jack Wolfskin Ausrustung Fur Draussen GmbH & Co. KGAA v. New Millennium Sports, S.L.U.*, 797 F.3d 1363, 116 USPQ2d 1129, 1136 (Fed. Cir. 2015) (citing *Juice Generation*, 115 USPQ2d at 1674).

Applicant failed to submit evidence of marketplace use of CHILL or CHILL-formative marks for beer. Instead, Applicant cited several factually inapposite cases for the proposition that the courts and the Board “have determined that different categories of alcoholic beverages are sufficiently unrelated to one another,”⁹

⁹ Applicant cited the following precedential cases: *In re Coors*, 68 USPQ2d 1059 (BLUE MOON (and Design) for “beer” and BLUE MOON (and Design) for “restaurant services” not related; “something more” required); *G.H. Mumm & Cie v. Desnoes & Geddes Ltd.*, 917 F.2d 1292, 16 USPQ2d 1635 (Fed. Cir. 1990) (RED STRIPE (and Design) for beer and “diagonal red stripe” design for wines and sparkling wines not likely to be confused based on differences in appearance, substantial pricing differences, differences in marketing, and over a decade of coexistence in the United States without any evidence of actual confusion); *Nat’l Distillers and Chem. Corp. v. William Grant & Sons, Inc.*, 505 F.2d 719, 184 USPQ 34

(4 TTABVUE 14-15), and submitted TSDR records of four groups of registered marks — ten overall — which identify different types, or categories, of alcoholic beverages.¹⁰ (4 TTABVUE 15-16). Only two of those registrations are for CHILL-formative marks, but neither identify beer as a good.¹¹

Additionally, Applicant points to eight CHILL-formative mark registrations for various alcoholic beverages proffered during examination by the Examining

(CCPA 1974) (DUET for prepared alcoholic cocktails, some of which contained brandy, not likely to be confused with DUVET for French brandy and liqueurs based on different connotations and differences in the nature of the goods); *In re White Rock Distilleries, Inc.*, 92 USPQ2d 1282 (TTAB 2009) (VOLTA for “energy vodka infused with caffeine” and TERZA VOLTA (composite mark) for, inter alia, “wines” not related).

Applicant cited a non-precedential, factually inapposite Board decision, *Bell’s Brewery, Inc. v. Bell Hill Vineyards, LLC*, Opp. 91177980, 2009 WL 5118319 (TTAB Dec. 18, 2009) (BELL HILL for “packaged wine” and BELL’S (composite mark) for “beer, including porter and ale, stout and malt liquor” not likely to be confused; marks were distinct and record failed to establish relatedness of the goods, even though trade channels and consumers overlapped), *aff’d mem.*, 404 Fed. App’x 502 (Fed. Cir. Dec. 13, 2010). An opinion designated as not precedential is not binding upon the Board, but may be cited for whatever persuasive value it might have. TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE (TBMP) §§ 101.03, 1203.02(f) (2023). Generally, the practice of citing non-precedential opinions is not encouraged. *In re Morrison & Foerster LLP*, 110 USPQ2d 1423, 1427 n.6 (TTAB 2014); *In re the Procter & Gamble Co.*, 105 USPQ2d 1119, 1120-21 (TTAB 2012). Applicant also cited two cases, one from the U.S. Court of Appeals for the Second Circuit and one from the U.S. District Court, N.D. Cal., that we do not consider as persuasive authority. “While parties may cite relevant cases from any jurisdiction, the Board relies primarily on precedent from the U.S. Court of Appeals for the Federal Circuit (‘Federal Circuit’), not only because the Federal Circuit is the Board’s primary reviewing court, but also because its cases address registration issues more specifically.” TBMP § 801.03. *See also Grand Canyon W. Ranch LLC v. Hualapai Tribe*, 88 USPQ2d 1501, 1506 n.2 (TTAB 2008) (parties cited 9th Circuit authority extensively, but Board relied on precedent from Federal Circuit); TBMP § 101.03.

¹⁰ *See* Response to Office Action dated Dec. 7, 2022 at 19-37. Applicant states that it also submitted for the record the registrations for FIRE WATER, Reg. No. 1,819,150, for “liqueur” in Class 33, and FIREWATER, Reg. No. 5,776,879, for “tequila” in Class 33. We did not find those registrations in the record.

¹¹ Chill., Reg. No. 4,818,933, for “wine” in Class 33, and CHILL VODKA, Reg. No. 5,728,047, for “Distilled spirits, namely, vodka” in Class 33.

Attorney.¹² Applicant argues that those eight registrations demonstrate “there is sufficient coexistence among the relevant goods such that differences between the marks ... can be enough of a discerning factor,” (4 TTABVUE 18), to show that “consumers are attentive to small distinctions between marks and/or goods.” (4 TTABVUE 19).

First, we note that each case is decided on its own record. *In re Nett Designs, Inc.*, 236 F.3d 1339, 57 USPQ2d 1564, 1566 (Fed. Cir. 2001). Keeping that in mind, we decline to adopt the general proposition that Applicant appears to assert here: Namely, that alcoholic beverages, generally, are relevant goods for purposes of determining the strength of the Registered Mark, which is for “beer.”

As discussed, this record lacks evidence of actual third-party use of CHILL or CHILL-formative marks for beer. And the third-party registration evidence of record is not probative of commercial, or marketplace, weakness, inasmuch as it tells us nothing about the extent to which the third-party marks may have been used, or the amount of exposure relevant customers may have had to those marks. *Primrose Ret.*

¹² See Nonfinal Office Action dated June 7, 2022 at 6-45. Four of the marks are for the cited marks, Reg. Nos. 6,092,336; 6,063,146; 6,043,581; and 6,146,108. The other four marks are: CHILLZ, Reg. No. 5,256,972, for “Alcoholic beverages, namely, distilled spirits, non-distilled alcoholic drinks, liqueurs” in Class 33; CHILL VODKA, Reg. No. 5,728,047, for “Distilled Spirits, namely, vodka” in Class 33 (“vodka” disclaimed); CHILL AF, Reg. No. 6,860,175, for “Wine” in Class 33; CITRUS CHILL, Reg. No. 6,274,221, for “Wine” in Class 33 (“citrus” disclaimed). The Section 2(d) refusals for CHILL AF, CHILL VODKA, CITRUS CHILL, and CHILLZ were withdrawn. See Final Office Action dated Jan. 9, 2023.

The record also includes two abandoned applications: BOTANICAL CHILL, Ser. No. 88510152, and JUS CHILL (composite mark), Ser. No. 90742808. An abandoned application has no probative value other than to show that the application was filed. *In re Bayer Aktiengesellschaft*, 488 F.3d 960, 82 USPQ2d 1828, 1831 n.2 (Fed. Cir. 2007); *Kemi Organics, LLC v. Gupta*, 126 USPQ2d 1601, 1606 (TTAB 2018).

Cmtys., LLC v. Edward Rose Sr. Living, LLC, 122 USPQ2d 1030, 1036 (TTAB 2016). Since we do not have any evidence of the extent of their actual use, none of the third-party registrations “show that customers ... have been educated to distinguish between different ... [CHILL-formative] marks on the basis of minute distinctions.” *Juice Generation*, 115 USPQ2d at 1674; *see also In re Morinaga Nyugyo K.K.*, 120 USPQ2d 1738, 1745 (TTAB 2016) (third-party registrations “standing alone, are not evidence that the registered marks are in use on a commercial scale, let alone that consumers have become so accustomed to seeing them in the marketplace that they have learned to distinguish among them by minor differences.”). Thus, we do not find the Registrant’s Mark commercially weak.

Turning to the conceptual strength of the Registered Mark, in general, third-party registrations of record “may bear on conceptual weakness if a term is commonly registered for similar goods or services.” *Tao Licensing, LLC v. Bender Consulting Ltd.*, 125 USPQ2d 1043, 1057 (TTAB 2017); *see also In re Mighty Leaf Tea*, 601 F.3d 1342, 94 USPQ2d 1257, 1259 (Fed. Cir. 2010). The nine third-party CHILL-formative registrations of record here (which include the four cited registrations)¹³ hardly represent the “ubiquitous” or “considerable” use of similar marks for similar goods found to be probative in prior precedential cases. *See In re i.am.symbolic, llc*, 866 F.3d 1315, 123 USPQ2d 1744, 1752 (Fed. Cir. 2017) (citing *Jack Wolfskin*, 116 USPQ2d at 1136-37); *cf. In re Hartz Hotel Servs., Inc.*, 102 USPQ2d 1150 (TTAB 2012) (no likelihood of confusion between GRAND HOTELS NYC, for “hotel services,” and

¹³ *See supra* text accompanying nn. 11 & 12.

GRAND HOTEL, for “hotel and restaurant services”; Board found GRAND HOTEL suggestive, along with a proliferation of registrations and third-party unregistered uses of GRAND HOTEL); *Knight Textile Corp. v. Jones Inv. Co.*, 75 USPQ2d 1313 (TTAB 2005) (no likelihood of confusion between NORTON MCNAUGHTON ESSENTIALS, for “ladies’ sportswear, namely, shirts, shorts, pants, jumpers, dresses, skirts, jackets, blouses and vests,” and ESSENTIALS, for “women’s clothing, namely pants, blouses, shorts, and jackets for women”; evidence included twenty-three third-party registrations (owned by twenty-one different owners) incorporating the word “essentials”). Beer, or a type of beer, is identified as a good only in the four cited registrations (which are owned by two different corporations). Beer is not identified as a good in any of the remaining five CHILL-formative registrations. However, the Registered Mark, CHILL, is conceptually strong and inherently distinctive for beer, as it issued on the Principal Register without a claim of acquired distinctiveness. *New Era Cap Co. v. Pro Era, LLC*, 2020 USPQ2d 10596, at *10 (TTAB 2020). Without any evidence of record as to commercial strength (or fame), which is usually treated as neutral in ex parte appeals, the Registered Mark is entitled, at a minimum, to the “normal scope of protection to which [an] inherently distinctive mark[] is entitled.” *Bell’s Brewery, Inc. v. Innovation Brewing*, 125 USPQ2d 1340, 1347 (TTAB 2017) (citing *Joseph Phelps Vineyards, LLC v. Fairmont Holdings, LLC*, 857 F.3d 1323, 122 USPQ2d 1733, 1734 (Fed. Cir. 2017)). Therefore, we do not find that the Registered Mark is weak.

II. Conclusion

Having considered all of the arguments and evidence relating to the relevant likelihood of confusion factors, we find that on this record confusion is likely between Applicant's standard character mark CHILL, for "hard seltzer" in Class 33, and Registrant's Mark CHILL for "Beer" in Class 32, given that the marks, trade channels, and classes of purchasers are identical, and the goods are highly related.

Decision: We affirm the refusal to register Applicant's Mark under Section 2(d) of the Trademark Act.